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237–971—66

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 548

BERNARD G. MCGARRY, ET AL., PETITIONERS

v.

WILLIAM E. RILEY, SPECIAL AGENT, INTELLIGENCE DIVISION, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17–24) is reported at 363 F. 2d 421. The opinion of the district court (R. 123–136)[1] is reported at 248 F. Supp. 545.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1966 (Pet. 24). This petition was filed on September 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Pursuant to a court order enforcing an Internal Revenue Service summons against two corporate offi-

[1] "R." references are to the Record Appendix to Brief for Appellants filed in the court of appeals.

cers, the Internal Revenue Service had in its possession certain corporate records. Thereafter attorneys for the corporate officers prevented the Internal Revenue Service from completing its examination of the records by physically carrying them away. The district court ordered the records returned and adjudged the attorneys guilty of civil contempt, but imposed no penalties. While the appeal from this order was pending, the Internal Revenue Service completed its examination and returned the records. The questions presented are:

1. Whether the civil contempt order is moot.

2. Whether the attorneys may defend their contemptuous action on the ground that the district court's order of production which they violated was erroneous or ambiguous.

3. Whether the corporate officers, who had previously resisted the summonses and been ordered to comply, may now relitigate the validity of the summonses.

4. Whether the district court should have declined to enforce the summonses on the ground—asserted by petitioners—that they were issued in aid of a criminal investigation.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where

none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 7602.)

STATEMENT

In 1964 the Internal Revenue Service was investigating the tax liabilities of Bernard G. McGarry and his wife. As a part of that investigation Special Agent Rose served administrative summonses on two

corporate officers (petitioners Harrington and McGarry[2]) calling for the production of corporate records. These two petitioners refused to produce the requested documents and the government initiated enforcement proceedings in the district court, which ordered them to comply with the summonses. The court of appeals affirmed. *McGarry's, Inc.* v. *Rose*, 344 F. 2d 416 (C.A. 1). The district court then entered a new order requiring that the records be produced on July 9, 1965. (R. 9–16, 123–124.)

On the latter date petitioners Harrington and McGarry, accompanied by their attorneys, petitioners O'Donnell and Greene, appeared with the records before Special Agent Riley. O'Donnell declared that no photostats would be made and that the records could be examined only while either he or Greene was present. No agreement was reached concerning photostating, but it was arranged that examination would proceed only in the presence of one of these two attorneys, the records to be placed in sealed boxes at the end of each day's examination. The examination thus proceeded from July 9 until August 16, although on approximately fourteen business days the examination was suspended because neither Greene nor O'Donnell appeared. In view of the slow progress, Riley, on August 16, informed Greene that thereafter the schedule of examination would be from 8:30 a.m. until 5:00 p.m. and that some records would be photostated. Greene threatened to remove the records.

[2] Petitioner McGarry is also the subject of the instant tax investigation. However, the summonses requested only corporate records; no personal records or documents were sought.

Neither O'Donnell nor Greene appeared during the rest of the week of August 16 (R. 125–128).

On August 23 the Special Agents, Revenue Agents, O'Donnell and Greene convened in the room where the examination was to be resumed. At O'Donnell's request, all the boxes containing the records were brought into the room. O'Donnell threw his brief case on the boxes, declared that they were thereby in his possession, and said that he would remove them because the agents had had enough time and because they had no right to make photostats. Although told that the examination had not been completed, O'Donnell and Greene carried the records away (R. 128).

The district court found that the Internal Revenue Service had not had the records for an unreasonable length of time, that O'Donnell's objection to photostating was designed to delay and obstruct the examination, that the purpose of the examination was to determine the correctness of the returns and the tax liability of Bernard G. McGarry, and that O'Donnell and Greene knowingly and intentionally violated the court's order enforcing the summonses (R. 130–133). It found O'Donnell and Greene guilty of civil contempt but imposed no penalty.[3] It ordered the clerk of court (to whom the records had been delivered) to deliver the records to the Internal Revenue Service for further examination, including photostating, and enjoined petitioners from interfering with the examination (R. 135–136). The court of appeals affirmed

[3] The court found Harrington and McGarry not guilty of any contempt, because the evidence did not warrant a finding that they authorized the actions of O'Donnell and Greene (R. 133, 135).

(Pet. 24). While the appeal to the court of appeals was pending, the Internal Revenue Service completed its examination of the records involved and returned them to petitioners (Pet. 18, fn. 2).

ARGUMENT

Since the legal position of the two attorneys (petitioners O'Donnell and Greene) is not the same as that of their clients (petitioners McGarry and Harrington), their respective rights will be considered separately.

1. (a) Petitioners O'Donnell and Greene are not entitled to further review because their case is moot. The only contention in which they, as individuals, have any interest is that the *civil* contempt judgment was in error. But even in the case of a *criminal* contempt judgment imposing a sentence of imprisonment, the case is moot once the sentence has been completely served. *St. Pierre* v. *United States*, 319 U.S. 41. In that case, it was observed (p. 43) that, where the sentence has been served, petitioners must show that "further penalties or disabilities can be imposed * * * as a result of the judgment * * *." Here, the only such showing is the conjecture (Pet. 18, fn. 2) that this civil contempt judgment, itself devoid of penalties, might subject petitioners, as attorneys, to disciplinary action. Petitioners cite no cases holding that such a remote and unlikely possibility is sufficient to overcome the rule of mootness, and we submit that it is not "sufficiently substantial

to justify * * * dealing with the merits." *Pollard* v. *United States*, 352 U.S. 354, 358.*

(b) Even if the issue is not moot, O'Donnell and Greene cannot defend their contemptuous conduct by attacking the court order which they violated as ambiguous or erroneous. The district court had previously ordered the documents produced and the court of appeals had affirmed. Pursuant to the district court's order the documents were then turned over to the Internal Revenue Service. Petitioners now claim that they were justified in physically removing the records from the Internal Revenue Service's possession either because the district court's order specified no time limit for termination of the examination or because it was silent as to methods of copying (*e.g.*, photostating) which the Internal Revenue Service might use. The lower courts correctly rejected all such contentions (Pet. 17–22). If petitioners really had any doubt as to whether the Internal Revenue Service had held the documents an unreasonable length of time (31 working days), they could have made an appropriate motion in the district court for return of the documents. If they really thought the district court would require the Internal Revenue Service to hand copy the documents, they could have asked the district court to order the agents not to photostat them. Instead, in

* The government took the position in the court of appeals that the proceeding was not moot. However, since the existence of a present controversy goes to the jurisdiction of the Court and thus can be raised at any stage in the proceeding (*St. Pierre* v. *United States*, 319 U.S. 41, 42), we have reexamined our position.

the face of the district court's extant discovery order, petitioners unilaterally removed the documments from the Internal Revenue Service's possession. As the court of appeals stated (quoting from this Court's decision in *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293), "The defendants, in making their private determination of the law, acted at their peril."

2. (a) The other two petitioners, McGarry and Harrington, were ordered as corporate officers to produce corporate records. Since the examination of these records has now been completed (Pet. 18, fn. 2), they could have no interest in further review except a desire to determine in this proceeding whether information obtained from the records would be admissible in some future trial or proceeding. Such a question would properly be presented by a motion to suppress the evidence if the government does in fact seek to use it in a future proceeding. The instant appeal from the civil contempt order is not an appropriate context in which to review that question.

(b) Even if the instant proceeding were an appropriate method of reviewing the district court's order to produce the documents, petitioners McGarry and Harrington have already litigated the validity of these summonses. After petitioners initially refused to comply with the summonses, the Internal Revenue Service brought a compliance proceeding in the district court. The district court granted the Internal Revenue Service's request and petitioners appealed, contending on five grounds that the summonses were

invalid and unenforceable. The court of appeals nevertheless affirmed and petitioners did not apply for a writ of certiorari. *McGarry's, Inc.* v. *Rose,* 344 F. 2d 416 (C.A. 1). They now raise one additional objection, that the summonses were issued in aid of a criminal investigation. Since that objection could have been raised in the previous proceedings, petitioners are now precluded from relitigating the validity of the summonses. See *Commissioner* v. *Sunnen,* 333 U.S. 591, 597.

(c) Finally, the summonses were valid in any event. Section 7602 of the Internal Revenue Code of 1954, *supra,* pp. 2–3, authorizes the Internal Revenue Service to issue administrative summonses in order to verify any person's tax liabilities, and this authority has properly been delegated to Agents and Special Agents of the Internal Revenue Service. Treas. Regs. under the 1954 Code (26 C.F.R.), §§ 301.7602–1, 301.7603–1. Any tax investigation may result in a recommendation for criminal prosecution as well as civil collection procedures. Here, as the court of appeals recognized, the instant investigation involved both civil and criminal aspects. Not until eleven months after the summonses were issued did the Internal Revenue Service investigators recommend criminal prosecution (Pet. 23–24). To deny the Internal Revenue Service the right to obtain from third parties records required in connection with a tax investigation merely because criminal prosecution is a possibility would virtually write Section 7602 out of the Code. Therefore, the lower courts have uniformly rejected such a contention. See, *e.g., Boren* v. *Tucker,* 239 F. 2d 767, 772

(C.A. 9); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2), certiorari denied, 373 U.S. 902; *Tillotson* v. *Boughner*, 333 F. 2d 515 (C.A. 7), certiorari denied, 379 U.S. 913; *Lash* v. *Nighosian*, 273 F. 2d 185, 188 (C.A. 1), certiorari denied, 362 U.S. 904.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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